No. 10-958

In The

Supreme Court of the United States

CELANESE CORPORATION,

Petitioner,

v.

MARTIN K. EBY CONSTRUCTION CO., INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Petitioner brought this suit under Section 107(a)(3), 42 U.S.C. § 9607(a)(3), of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 *et seq.*, alleging respondent Eby and others decided to cover up damage to a pipeline, knowing the damage could result in a leak of a hazardous substance, and therefore Eby was an entity that "arranged for disposal" of hazardous substances. After judgment was entered on findings that Eby had no such knowledge and was therefore not an arranger, petitioner claimed Eby had a negligence-based obligation to investigate, and it consciously disregarded that obligation. The questions presented are:

1. Whether the court of appeals correctly held that petitioner had waived its conscious-disregard argument by not trying the case on that theory.

2. Whether the court of appeals properly affirmed the judgment on the ground that Eby did not take intentional steps or plan to dispose of a hazardous substance, particularly when it did not know it had struck petitioner's pipeline.

CORPORATE DISCLOSURE STATEMENT

Martin K. Eby Construction Company, Inc. is the successor to Chisholm Trail Construction, Inc. and is a subsidiary of Eby Corporation, a privately owned entity.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 620 F.3d 529. The opinion of the magistrate judge (Pet. App. 10a-21a) is reported at 2009 WL 981717.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 2010. A motion for rehearing en banc and for panel rehearing (Pet. App. 26a) was denied on October 26, 2010. The petition for a writ of certiorari was filed on January 24, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, defines four categories of persons who are potentially responsible parties, liable for the remediation of a release of a hazardous substance, for cost of response, and damages. One of the four categories of potentially responsible parties is an "arranger." 42 U.S.C. § 9607(a)(3). CERCLA does not specifically define who an arranger is, leaving it to

the courts to develop their own construction of the term. This Court has described the determination of arranger liability as fact intensive and case-specific. Still, 42 U.S.C. § 9607(a)(3) does require that a person "by contract, agreement, or otherwise" "arrange for disposal" of a hazardous substance. In *Burlington N. & Santa Fe Ry. Co. v. United States,* 129 S. Ct. 1870 (2009), this Court held that the statutory term "arrange for" "implies action directed at a specific purpose." *Burlington Northern* at 1879. Thus an arranger must intend or plan for the disposal of a hazardous substance to be liable under CERCLA.

2. a. In 1979, the Coastal Water Authority of Texas ("CWA") contracted with Eby to install an underground water pipeline that would serve industrial facilities at the Bayport Marine Terminal in Harris County, Texas. Pet. App. 2a. Kellogg, Brown & Root, Inc. was hired to provide engineering services to CWA, including inspection of Eby's work. Pet. App. 12a.

The CWA water pipeline was to cross several underground pipelines, including petitioner's methanol pipeline. To accomplish this, Eby first excavated an area to install a pipeline segment, thereby uncovering the pipelines in that area. Eby then ran its own pipeline underneath those pipelines. After installing a segment, Eby backfilled that area and repeated the process with the next segment. Pet. App. 2a.

b. While excavating the area near petitioner's pipeline, an Eby employee struck and damaged that pipeline with a backhoe. The employee did not know what he had struck, and there was no contemporaneous report of the incident by Kellogg, Brown & Root, Inc. Eby, or anyone else. Pet. App. 2a, 14a. Further, neither Eby, its employees, nor Kellogg, Brown & Root, Inc. knew that the work on the CWA pipeline had damaged the petitioner's pipeline. Pet. App. 2a, 15a.

c. Petitioner learned that methanol was leaking from its pipeline in fall 2002, after a patch of dead grass was discovered on its property. After finding the leak, petitioner fixed the pipeline and cleaned up the site. Eventually, petitioner removed and disposed over 230,000 gallons of methanol from the subsurface of its property. Pet. App. 3a.

3. a. Petitioner filed suit in federal district court against CWA and Kellogg, Brown & Root, Inc. asserting claims under both CERCLA and the Texas Solid Waste Disposal Act, TEX. HEALTH & SAFETY CODE § 361.344. Pet. App. 3a, 10a. The parties agreed to try the case to the magistrate judge. Eby was later joined as a defendant, and the case proceed to trial against KBR and Eby only, CWA having been dismissed on summary judgment. Pet. App. 10a n. 1.

A jury was empanelled for the Texas state law claims; the magistrate judge treated the jury as advisory with respect to the CERCLA claims. Pet. App. 11a. The jury found that neither Eby nor Kellogg, Brown & Root, Inc. knew the petitioner's

pipeline had been damaged, and the magistrate judge adopted those findings. Pet. App. 15a. The magistrate judge thereafter entered findings of fact and conclusions of law (Pet. App. 10a-21a), recommending entry of judgment that petitioner take nothing. Judgment was then entered in Eby's favor. Pet. App. 22a.

b. Petitioner thereafter filed a Rule 59(e) motion and argued for the first time Eby was liable whether or not Eby knew it had hit the methanol pipeline. The magistrate judge determined there was no factual basis to infer any intent to dispose on the part of Eby, in light of the jury's findings. Pet. App. 24a. Moreover, the new claim that Eby should have investigated while digging was at most a negligence claim, which the magistrate judge held insufficient to trigger arranger liability under *Burlington Northern*. Pet. App. 24a. A take-nothing final judgment (Pet. App. 22a) was entered against petitioner.

4. a. Petitioner did not appeal the judgment in favor of Kellogg, Brown & Root, Inc.. Further, on appeal to the Fifth Circuit, petitioner did not challenge the evidence or the findings of the magistrate judge and jury. Thus, it was undisputed that Eby's back-hoe operator was unaware that the petitioner's pipeline had been struck or that any damage had occurred. Petitioner argued Eby was still liable as an arranger, now claiming that Eby's employee's failure to investigate was a conscious disregard of Eby's contract duties to CWA and of common industry practices. Petitioner argued this conscious disregard

was equivalent to intent. Eby complained the argument was not preserved.

b. The court of appeals affirmed the judgment in favor of Eby. The court first concluded that petitioner had waived its conscious-disregard argument because the case had not been tried on that theory. Pet. App. 4a. The court noted that petitioner did not seek a finding on conscious disregard, but instead "tried this case on an entirely different theory – that Eby had actually known that it had struck and damaged the [petitioner's] pipeline and then attempted to cover it up." Pet. App. 4a-5a.

c. Second, the court of appeals – relying on this Court's decision in *Burlington Northern* – agreed with the magistrate judge that Eby was not liable as an arranger under CERCLA because it did not plan or take any intentional steps to release methanol from petitioner's pipeline. Pet. App. 8a. The court rejected petitioner's claim that conscious disregard of a duty to investigate would be tantamount to intentionally taking steps to dispose of a hazardous substance. Pet. App. 8a.

5. Petitioner's request for rehearing and rehearing en banc were denied (Pet. App. 26a), with no member of the court of appeals requesting a vote.

ARGUMENT

The court of appeals correctly concluded that petitioner had waived its conscious-disregard argument since it tried its CERCLA case on the theory that Eby knew and covered up the disposal of a hazardous substance. The decision below, holding that Rule 59(e) cannot be used to argue new legal theories, does not conflict with the holding of any court of appeals. The Fifth Circuit's alternative holding – that conscious-disregard allegations do not establish arranger liability – is that court's first application of *Burlington Northern*. Other appellate courts, however, have not yet examined *Burlington Northern* and, thus, there is no existing circuit split.[1] Under those circumstances, further review is not warranted.

1. a. This case does not present a suitable vehicle to take up the question of whether conscious disregard establishes intent in arranger cases because the issue was waived at trial. The blind-eye, deliberate-indifference, willful-ignorance, or conscious-disregard arguments were not raised by petitioner until after trial, in its Rule 59 motion or on appeal. Petitioner conceded this fact to the court of appeals during oral argument.

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[1] The only post-*Burlington Northern* case petitioner has cited (Pet 10) is a district court opinion denying a Rule 12(b)(6) motion and allowing discovery in aid of arranger liability's "fact-intensive inquiry." *United States v. Washington State Dept of Transp.*, 665 F. Supp. 2d 1233, 1242 (W.D. Wash 2009)

The court of appeals' conclusion (Pet. App. 4a) that petitioner waived its argument is fully consistent with Rule 59(e) and the holding of other courts of appeals: "Rule 59(e) does not give a party the opportunity to undo its own procedural failures or present new evidence or arguments that could and should have been presented to the district court prior to the judgment." *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996); *see also United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006) (holding Rule 59(e) cannot be used to tender new legal theories or raise arguments which could have been made prior to entry of judgment); *Pac. Ins. Co. v. Am. Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (Rule 59(e) motion not available "to enable a party to complete presenting his case after the court has ruled against him" (quoting *Frietsch v. Refco, Inc.*, 56 F.3d 825, 828 (7th Cir. 1995)).

Moreover, the magistrate judge concluded petitioner's theory was a claim of negligence, insufficient to trigger arranger liability after *Burlington Northern*. Pet. App. 42a. Reframing that argument on appeal as a strategy-of-willful-ignorance claim (Pet. 15), petitioner sidesteps both the way the case was tried and the nature of its post-judgment claims in the district court, moving from negligence concepts to intentional conduct. The court of appeals, however, correctly held petitioner had waived its newly-minted argument under either pre-existing Fifth Circuit precedent, or *Burlington Northern*. Pet. App. 5a & n. 1.

Because petitioner did not preserve its conscious-disregard argument prior to judgment, this alone is reason to deny further review.

b. With respect to the court of appeals' waiver holding, petitioner argues (Pet. 15-17) that the decision below is in conflict with a decision of the Fourth Circuit, but there is no merit to the suggestion. The limits of Rule 59(e) were not even at issue in *Crofton Ventures L.P. v. G & H Partnership*, 258 F.3d 292 (4th Cir. 2001). The plaintiff Crofton argued at trial, in final argument, that the defendant actively dumped waste, or that wastes had passively leaked onto the defendant's land. The district court "misconstrued the requirements for establishing liability under CERCLA" by requiring the plaintiff to prove the defendant actually dumped waste or was involved in the dumping. *Id.* at 298. The majority panel held that disposal of waste includes both active dumping and passive leaking of hazardous waste, and the distinction had been properly raised in closing argument. The dissent disagreed, finding a delay in arguing the passive theory in final summation. *Compare id.* at 298 n. 3 with 301 & n. 1. Still, that divided holding does not conflict with the Fifth Circuit's decision here, where petitioner waited until after entry of judgment to argue a new legal theory of liability.

As the court of appeals below correctly observed, petitioner never raised the issue pretrial or obtained findings from the court or jury that Eby consciously disregarded any duty because it tried the case "on an entirely different theory." Pet. App. 5a. The factual

differences between this case and *Crofton Ventures L.P. v. G & H Partnership* raise no important legal issue and present no conflict.

2. a. Further, this Court does not need to take up the question of whether conscious disregard establishes intent in arranger cases because lower courts will revisit the issue in light of *Burlington Northern*, but on better developed records. Petitioner claims (Pet. 8-9) that the Third, Eighth and Eleventh Circuits – in *Morton Int'l Inv. v. A.E. Staley Mfg. Co.*, 343 F.3d 669 (3rd Cir. 2003); *United States v. TIC Investment Corp.*, 68 F.3d 1082 (8th Cir. 1995), *cert. denied*, 519 U.S. 808 (1996); and *South Fla. Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402 (11th Cir. 1996) respectively – held that specific intent is not required or determinative for arranger liability. Every appellate decision cited by petitioner was decided well before *Burlington Northern* and all were discussed in the *Burlington Northern* briefing before this Court.[2] There is a substantial likelihood that these courts of appeals will reconsider their decisions in light of the Court's intervening decision, and some of these holdings may be discredited after application of *Burlington Northern*'s statutory analysis. The Court should therefore decline to examine the conscious-disregard question now, especially on what the court

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[2] *See* Brief of the United States in Opposition at pp. 14-15, *Burlington N. & Santa Fe Ry Co v. United States*, 129 S Ct. 1870 (2009) (07-1601 and 07-1607), 2008 WL 5266416

of appeals correctly determined is an undeveloped record. Pet. App. 5a & n. 1.

b. Although petitioner also claims the Second Circuit's approach (testing an obligation to control disposal) differs from the Ninth Circuit's approach in *Cadillac Fairview/Cal., Inc. v. United States*, 41 F.3d 562, 566 (9th Cir. 1994) (imposing liability without control in light of all the circumstances) (Pet. 8), this does not establish a circuit split on the same matter. Because "Congress has created multiple and co-equal intermediate federal appellate courts, each with an equal power and duty to decide the cases properly brought before it," its design necessarily contemplates "the possibility of a considered difference in views among the circuit courts on a given question." *Washington Energy Co. v. United States*, 94 F.3d 1557, 1561 (Fed. Cir. 1996). Arranger liability has always been fact-bound, as the courts must look past "the parties' characterization of the transaction as a 'disposal' or a 'sale' and seek[ ] to discern whether the arrangement was one Congress intended to fall within the scope of CERCLA's strict-liability provisions." *Burlington Northern* at 1879. These allegedly conflicting approaches merely acknowledge the case-by-case factual analysis involved in arranger liability; but again, their analyses will be further refined as they apply *Burlington Northern*'s reasoning.[3]

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[3] *Burlington Northern* reversed the Ninth Circuit's holding that the defendant in that case had "sufficient control over, and

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3. a. The decision of the court of appeals was correct. Petitioner is mistaken in its suggestion that *Burlington Northern* should be limited to the useful product doctrine because only there is the intention of a seller important. Pet. 9. That argument disregards the statutory text. In *Burlington Northern*, this Court looked to the ordinary meaning and dictionary definition of the term "arrange for" and found that "under the plain language of the statute, an entity may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance." *Id.* at 1879. The same statutory language applies to the alleged arranger liability in this case; petitioner offers no principled reason to use a different meaning of "arrange for" in this case, except its circular argument (Pet. 9) that conscious disregard should suffice.

Eby did not know or desire that a disposal of a hazardous waste would result from its construction activities in 1979. And such knowledge alone, if it had existed, would still not prove that Eby planned to dispose of a hazardous substance. This Court in *Burlington Northern* concluded that "knowledge alone is insufficient to prove that an entity 'planned for' the

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knowledge of, the transfer process to be considered an 'arranger,' within the meaning of CERCLA" and "an entity can be an arranger even if it did not intend to dispose of the product." *United States v Burlington N & Santa Fe Ry. Co*, 520 F.3d 918, 949 (9th Cir. 2008). The holding in the Ninth Circuit's earlier precedent *Cadillac Fairview/Cal., Inc v United States*, 41 F.3d 562, 566 (9th Cir. 1994) is also of questionable vitality

disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product." *Id.* at 1880. Although petitioner emphasizes the Court's mention of sale of a useful product, the Court's holding is just as supportive in a case like this. Whether waste or a useful product is at issue, evidence of intentional steps to dispose of the substance is necessary. A case involving disposal of waste may be easier for a plaintiff to prove a plan to dispose; a case involving the sale of a useful product may be much harder; and the balance of cases in the middle will present their own particular issues. But each will, pursuant to the language of the controlling statute, require evidence that the potentially responsible party took intentional steps and planned for the disposal of a hazardous substance.

b. Petitioner is wrong when arguing that a variety of parties will "avoid" CERCLA liability based on the court of appeals' rationale. Pet. 14. As the Court explained, arranger liability is fact-intensive and case specific. In this case, disposal of a hazardous substance was not an inherent or inevitable part of Eby's installation of a water pipeline. Eby did not know that petitioner's methanol pipeline had been damaged in its construction activities or that a leak would result over 20 years later. Pet. App. 15a. Petitioner's claim that Eby "deliberately turned a blind eye to the damage it did" (Pet. 15) is mere speculation, untested before a finder of fact. In contrast, petitioner's hypothetical cases involving accumulation of drums leaking hazardous substances; a truck

driver in a drum staging area; and a driver knowingly hauling hazardous waste, would present application of arranger law in a different context. Nevertheless, all of these fact scenarios sit comfortably within the *Burlington Northern* holding that arranger liability may not extend beyond the limits of the CERCLA statutory language.

To be sure, a party who is merely negligent will not have undertaken intentional steps to dispose and thus will not have arranged for disposal after *Burlington Northern*. CERCLA liability is properly precluded under those circumstances, and both lower courts here were correct in reaching that conclusion.[4] Pet. App. 8a, 24a.

c. Petitioner complains that if Eby is not liable, then no one is. The magistrate judge rejected the introduction of this argument post-judgment (Pet. App. 24a-25a) and noted petitioner had waived any claim that it was entitled to a third-party defense under the CERCLA statute. Petitioner decided to claim Eby was an arranger because it allegedly conspired with CWA and Kellogg, Brown & Root, Inc. to cover up a known disposal of waste. It failed to

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[4] Petitioner elected not to pursue a state common law negligence theory against Eby. On appeal, petitioner nevertheless argued that the common law of negligence imposed a duty on Eby to investigate what it hit while engaging in construction activities (Pet App 3a), and that its conscious disregard of the negligence duty established arranger liability

prove those allegations, and that is why Eby was not liable.

There is likewise no sound basis for the speculation of petitioner (Pet. 15) that owners will avoid cleanup operations over concern about costs, or that the government or taxpayers will carry the burden. Owners and operators are already potentially responsible parties under Section 107(a)(1), 42 U.S.C. § 9607(a)(3). Moreover, the questions involved in determining arranger liability under CERCLA are distinct from those involved in determining owner or operator liability. Proper construction of the legal standard for CERCLA arranger liability is neither reward nor punishment for conduct (Pet. 15); rather it enforces plain language and ordinary meaning, and therefore promotes the ultimate legislative purpose for enacting CERCLA. *See Gross v. FBL Fin. Services, Inc.*, 129 S. Ct. 2343, 2350, 174 L. Ed. 2d 119 (2009).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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FEBRUARY 2011